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SKU: 9780134105857-SOLUTIONS

Chapter C:2

Corporate Formations and Capital Structure

Discussion Questions

C:2-1 Various. A new business can be conducted as a sole proprietorship, partnership, C corporation, S corporation, LLC, or LLP. Each form has tax and nontax advantages and disadvantages. See pages C:2-2 through C:2-8 for a listing of the tax advantages and disadvantages of each form. A comparison of the C corporation, S corporation, and partnership alternative business forms appears in Appendix F. pp. C:2-2 through C:2-8.

C:2-2 Alice and Bill should consider forming a corporation and making an S corporation election. An S corporation election will permit the losses incurred during the first few years to be passed through to Alice and Bill and be used to offset income from other sources. The corporate form affords them limited liability. As an alternative to incorporating, Alice and Bill might consider setting up a limited liability company that is taxed as a partnership and also has limited liability. pp. C:2-6 through C:2-8.

C:2-3 Yes, several alternative classifications. The only default tax classification for the LLC is a partnership. Because the LLC has two owners, it cannot be taxed as a sole proprietorship. The entity can elect to be taxed as a C corporation or an S corporation. If the entity makes such an election, Sec. 351 applies to the deemed corporate formation. The entity would have to make a separate election to be treated as an S corporation. pp. C:2-8 and C:2-9.

C:2-4 The default tax classification for White Corporation is a C corporation. However, White can be treated as an S corporation if it makes the necessary election. Following an S corporation election, the entity's income will be taxed to its owners, thereby avoiding double taxation. The S corporation election is made by filing Form 2553 within the first 2½ months of the corporation's existence (see Chapter C:11). pp. C:2-6 and C:2-7.

C:2-5 The only default tax classification for the LLC is a sole proprietorship. Because the LLC has only a single owner, it cannot be treated as a partnership. Thus, the default classification is a "disregarded entity" taxed as a sole proprietorship. The entity can elect to be taxed as a C corporation or an S corporation. If the entity makes such an election, Sec. 351 applies to the deemed corporate formation. pp. C:2-8 and C:2-9.

C:2-6 Possible arguments include:

PRO (Corporate formations should be taxable events):

1. A corporate formation is an exchange transaction; therefore, parties to the exchange should recognize gains and losses.
2. Making a corporate formation a taxable event increases tax revenues.
3. Simplification is achieved by eliminating one of the two options - whether a transaction is taxable or not. This change will make administration of the tax laws easier.

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4. This change eliminates the need for taxpayers to structure transactions to avoid Sec. 351 to recognize gains and/or losses.

CON (No change should occur to current law):

1. A change in current law would hurt start-up corporations by reducing their capital through the income tax paid by transferors on an asset transfer.
2. No economic gains or losses are realized. Just a change in the form of ownership (direct vs. indirect) has occurred. Therefore, it is not appropriate to recognize gains and losses at this time.
3. With taxation, corporations will have to raise more capital because transferors of noncash property will have less capital to invest and because money must be diverted to pay taxes.
4. Taxpayers are prevented from recognizing losses under the current system, thereby increasing revenues to the government.
5. With taxation, businesses would be deterred from incorporating because of the tax consequences, and therefore economic growth in the U.S. would be adversely affected. pp. C:2-9 and C:2-10.

C:2-7 The following tax consequences, if Sec. 351 applies: Neither the transferor nor the transferee corporation recognizes gain or loss when property is exchanged for stock. Unless boot property (i.e., property other than qualified stock) is received, the transferor's realized gain or loss is deferred until he or she sells or exchanges the stock received. If boot property is received, the recognized gain is the lesser of (1) the amount of money plus the FMV of the nonmoney boot property received or (2) the realized gain. The transferor recognizes no losses even if boot property is received. The transferor's basis in the stock received references his or her basis in the property transferred and is increased by any gain recognized and is reduced by the amount of money plus the FMV of the nonmoney boot property received and the amount of any liabilities assumed by the transferee corporation. The basis of the boot property is its FMV. The transferee corporation recognizes no gain on the transfer. The transferee corporation's basis in the property received is the same basis that the transferor had in the property transferred increased by any gain recognized by the transferor. pp. C:2-12, C:2-16, and C:2-17.

C:2-8 For purposes of Sec. 351, the following items are considered to be property: Money and almost any other kind of tangible or intangible property, including installment obligations, accounts receivable, inventory, equipment, patents, trademarks, trade names, and computer software. Property does not include services, an indebtedness of the transferee corporation that is not evidenced by a security, or interest on an indebtedness that accrued on or after the beginning of the transferor's holding period for the debt. pp. C:2-12 and C:2-13.

C:2-9 "Control" is defined as follows: Transferrers as a group must own at least 80% of the total combined voting power of all classes of stock entitled to vote and at least 80% of the total number of shares of all other classes of stock. The nonvoting stock ownership is tested on a class-by-class basis. pp. C:2-13 through C:2-16.

C:2-10 The IRS has interpreted the phrase as follows: Sec. 351 requires the transferors to control the transferee corporation immediately after the exchange but does not specify how long this control must be maintained. The transferors, however, must not have a prearranged plan to dispose of their

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stock outside the control group. If they have such a plan, the IRS may not treat the transferors as in control immediately after the exchange. p. C:2-16.

C:2-11 No. The Sec. 351 requirements are not met because Peter is not considered a transferor of property. Even though he transferred $1,000 of money, this property is of nominal value--less than 10% of the value of the stock he received for services ($49,000). Therefore, only John and Mary are deemed to have transferred property and, since they own only 66-2/3% of the stock of New Corporation, they are not in control. The 10% minimum is specified in Rev. Proc. 77-37 and applies only for advance ruling purposes. The shareholders may choose to engage in the transaction without an advance ruling, report it as nontaxable, and run the risk of being audited, with the result that the IRS treats the transaction as taxable. Alternatively, they might restructure the transaction by having Peter provide a larger amount of cash to the corporation and take more shares of stock. Another option would be for Peter to provide fewer services with the increased amount of cash and still receive 100 shares of stock. pp. C:2-14 and C:2-15.

C:2-12 No. Section 351 does not require that the shareholders receive stock equal in value to the property transferred. Section 351 would apply to the transfer by Susan and Fred if all other requirements are met. However, Fred probably will be deemed to have made a gift of 25 shares of stock, paid compensation of $25,000, or repaid a $25,000 debt to Susan by transferring the Spade stock. pp. C:2-15 and C:2-16.

C:2-13 Yes. Section 351 applies to property transfers to an existing corporation. For the exchange to be tax-free, the transferors must be in control of the corporation immediately after the exchange. In this example, Carl is not in control since he owns only 75 out of 125 shares, or 60% of the North stock. Therefore, the Sec. 351 requirements are not met. To qualify under Sec. 351, Carl can transfer enough property to acquire a total of 200 shares out of 250 (200 shares held by Carl and 50 shares held by Lynn) outstanding shares. In this situation, Carl would own exactly 80% of North stock (250 shares x 0.80 = 200 shares). A less expensive alternative would be for Lynn to transfer property equal to or exceeding $10,000 (50 shares owned x $2,000 per share x 10% minimum) to be considered a transferor. pp. C:2-14 and C:2-15.

C:2-14 The transferor's basis in stock received in a Sec. 351 exchange is determined as follows (Sec. 358(a)):

Adjusted basis of property transferred to the corporation	
Plus:	Any gain recognized by the transferor
Minus:	FMV of boot received from the corporation
	Money received from the corporation
	The amount of any liabilities assumed by the transferee corporation
Adjusted basis of stock received	

For purposes of calculating stock basis, liabilities assumed by the transferee corporation are considered money and reduce the shareholder's basis in any stock received (Sec. 358(d)).

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The shareholder's holding period for the stock includes the holding period of any capital assets or Sec. 1231 assets transferred. If the shareholder transfers any other property (e.g., inventory), the holding period for any stock received begins on the day after the exchange date. This rule can cause some shares of transferee corporation stock to have two different holding periods. The shareholder's basis for any boot property is its FMV, and the holding period begins on the day after the exchange date (Sec. 358(a)(2)). pp. C:2-18 and C:2-19.

C:2-15 Two sets of circumstances may require recognition of gain when liabilities are transferred.

- First, all liabilities assumed by a controlled corporation are considered boot if the principal purpose of the transfer of any portion of such liabilities is tax avoidance or if no bona fide business purpose exists for the transfer (Sec. 357(b)).
- Second, if the total amount of liabilities transferred to a controlled corporation exceeds the total adjusted basis of all property transferred by the transferor, the excess liability amount is treated as a gain taxable to the transferor without regard to whether the transferor had actually realized gain or loss (Sec. 357(c)).

Under the second set of circumstances, the transferor recognizes gain, but the excess liabilities are not considered to be boot. Section 357(c)(3) provides special rules for cash basis transferors who transfer excess liabilities to a corporation. pp. C:2-22 through C:2-25.

C:2-16 The IRS likely would consider the following two factors: (1) The transferor's reason for incurring the liability (e.g., did the liability relate to the transferor's trade or business). (2) The length of time from when the liability was incurred to the transfer date. If the transferor incurred the liability in connection with his or her trade or business, a Sec. 357(b) "problem" probably would not exist even if the transferor incurred the liability shortly before the transfer date. pp. C:2-12 through C:2-27.

C:2-17 If Mark receives no boot, depreciation is not recaptured (Secs. 1245(b)(3) and 1250(d)(3)). The recapture potential is transferred to Utah Corporation along with the property. If Mark does receive boot and must recognize gain, the recognized gain is treated as ordinary income but not in an amount exceeding the recapture potential. Any remaining recapture potential is transferred to Utah. If Utah sells the property at a gain, it must recapture depreciation deducted by Mark and not recaptured at the time of the transfer, as well as depreciation that it has claimed. Depreciation in the year of transfer must be allocated between the transferor and transferee according to the number of months each party has held the property. The transferee is considered to have held the property for the entire month in which the property was transferred. pp. C:2-25 through C:2-27.

C:2-18 The assignment of income doctrine could apply to a transfer of unearned income. However, the assignment of income doctrine does not apply to a transfer of accounts receivable by a cash method transferor in a Sec. 351 exchange if (1) the transferor transfers substantially all the assets and liabilities of a business and (2) a business purpose exists for the transfer. (See Rev. Rul. 80-198, 1980-2 C.B. 113.) p. C:2-27.

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C:2-19 In enacting Sec. 385, Congress mandated that the following factors be taken into account in determining whether an amount advanced to a corporation should be characterized as debt or equity capital:

- Whether there is a written unconditional promise to pay on demand or on a specified date a sum certain in money in return for an adequate consideration in money or money's worth, and to pay a fixed rate of interest,
- Whether the debt is subordinate to or preferred over other indebtedness of the corporation,
- The ratio of debt to equity of the corporation,
- Whether the debt is convertible into the stock of the corporation, and
- The relationship between holdings of stock in the corporation and holdings of the interest in question.

Although Congress enacted Sec. 385 in an attempt to provide statutory guidelines for the debt/equity question, the lack of a subsequent set of interpretative regulations has required taxpayers, the IRS, and the courts to continue to use these statutory factors and other factors identified by the courts in ascertaining whether an instrument is debt or equity. Amendment of Sec. 385 in 1989 to permit part-debt and part-equity corporate instruments has lead to the issuance of administrative pronouncements (e.g., Notice 94-97, 1947-1 C.B. 357) that interpret the Sec. 385 statutory guidelines. See also O.H. Kruse Grain & Milling v. CIR, 5 AFTR 2d 1544, 60-2 USTC ¶9490 (9th Cir., 1960) cited in footnote 47 of the text, which lists additional factors the courts might consider. pp. C:2-27 and C:2-28.

C:2-20 Advantages of using debt include: Interest is deductible by the payor while a dividend payment is not deductible, and the repayment of an indebtedness generally is treated as a return of capital while a stock redemption often is treated as a dividend. Disadvantages of using debt include that dividend payments are eligible for a dividends-received deduction when received by a corporate shareholder; stock can be received tax-free as part of a corporate formation and/or reorganization while the receipt of debt usually is treated as boot; a distribution of stock to shareholders can be a nontaxable stock dividend while a distribution of a debt usually results in dividend income; and worthless stock results in an ordinary loss under Sec. 1244 while a worthless debt instrument generally results in a capital loss. pp. C:2-29 and C:2-30.

C:2-21 Ordinary loss treatment. The principal advantage of satisfying the Sec. 1244 small business stock requirements is the ordinary loss treatment available for individual shareholders and certain partnerships reporting up to $50,000 (or $100,000 if married and filing jointly) of losses incurred on a sale or exchange of the stock. Ordinary loss treatment is available only if the loss is incurred by a qualifying shareholder who acquired the stock from the small business corporation; the corporation was a small business corporation at the time it issued the stock (i.e., a corporation whose aggregate money and other property received for stock is less than $1 million); the corporation issued the stock for money or property (other than stock or securities); and the issuing corporation derived more than 50% of its aggregate gross receipts from active sources during the most recent five tax years ending before the date when the stock was sold or exchanged. pp. C:2-32 and C:2-33.

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C:2-22 The two advantages of business bad debt treatment are (1) a business bad debt deduction can be claimed for partial worthlessness and (2) a business bad debt can be deducted as an ordinary loss. A nonbusiness bad debt can be deducted only in the year in which total worthlessness occurs. No partial write-offs of nonbusiness bad debts are permitted. A nonbusiness bad debt can be deducted only as a short-term capital loss. These losses can offset capital gains or be deducted by individuals up to $3,000 in a tax year. No limit exists on business bad debt deductions and, if such losses exceed income, they can be carried back as part of a net operating loss. To claim a business bad debt deduction, the holder must show that the dominant motivation for the loan was related to the taxpayer's business and was not related to the taxpayer's investment activities. pp. C:2-33 and C:2-34.

C:2-23 To recognize gain or loss. Shareholders might avoid Sec. 351 treatment if, in transferring property, they realize a gain or loss that they want to recognize. They may be able to avoid Sec. 351 treatment by violating one or more of its requirements, for example, by selling the property to the corporation for cash, by selling the property to a third party who contributes it to the corporation, or by receiving sufficient boot to recognize the gain. pp. C:2-34 through C:2-36.

C:2-24 The reporting requirements are as follows: Every person who receives stock, securities, or other property in a Sec. 351 exchange must attach a statement to his or her tax return for the period that includes the date of the exchange. The statement must include all the facts pertinent to the exchange (see Reg. Sec. 1.351-3(a)). Similarly, the transferee corporation must attach a statement to its tax return for the year in which the exchange took place (see Reg. Sec. 1.351-3(b)). The transferee's statement requires a description of the property and liabilities received from the transferors and the stock and property transferred to the transferors in exchange for the property. p. C:2-36.

Issue Identification Questions

C:2-25 Mary and Peter should consider the following tax issues:

- Does the property transfer meet the Sec. 351 requirements?
  - Have Peter and Mary transferred property? Does Peter's controlling Trenton Corporation prior to the transfer change the tax result?
  - Are the transferors in control of the corporation immediately after the transfer?
  - Do the transferors receive transferee corporation stock?
- What is each shareholder's recognized gain?
- What is each shareholder's basis in his or her stock?
- What is each shareholder's holding period for his or her stock?
- Does Trenton recognize gain when it issues its stock?
- What is Trenton's basis in the property received from Mary?
- What is Trenton's holding period for the property received from Mary?

The property transfer meets all the Sec. 351 requirements. Peter and Mary are considered to own all 195 of the Trenton shares immediately after the exchange. Peter's contribution of cash for stock is not considered to be a nominal amount according to IRS rules relating to the issuance of private letter rulings (i.e., it equals or exceeds 10% of the value of Peter's prior stock holdings). Thus, his stock is counted towards the 80% minimum stock ownership for control. Mary recognizes no gain on the asset transfer and takes a $50,000 basis in the Trenton shares she receives. The

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holding period for the Trenton shares includes her holding period for the property transferred. Trenton recognizes no gain when it issues its stock and takes a $50,000 basis in the property. pp. C:2-12 through C:2-30.

C:2-26 Carl and his son should consider the following tax issues:

- Does the property transfer meet the Sec. 351 requirements?
  - Have Carl and his son transferred property?
  - Are the transferors in control of the corporation immediately after the transfer?
  - Do the transferors receive transferee corporation stock?
- Does the property contribution/receipt of stock as described in the facts reflect the true nature of the transaction? Or, has a deemed gift or other event occurred?
- What is each shareholder's recognized gain?
- What is each shareholder's basis in his stock?
- What is each shareholder's holding period in his stock?
- If a deemed gift has been made, is it a taxable gift from Carl to his son? (This question could be rewritten for events other than a gift (e.g., repayment of a loan.))
- What is Cook Corporation's basis in the property received from Carl?
- What is Cook's holding period for the property received from Carl?

The contribution is nontaxable because it meets all the Sec. 351 requirements, and Carl and Carl, Jr. own all the Cook stock. Carl, Jr. receives a disproportionate amount of stock relative to his $20,000 capital contribution. It appears that the transaction should be recast so that Carl is deemed to receive 80 shares of stock, each valued at $1,000. He then gifts 30 shares to Carl, Jr. The deemed gift leaves each shareholder with 50 shares of stock. Neither shareholder recognizes any gain, and Carl takes a $50,000 adjusted basis in the 80 shares he receives. He recognizes no gain on the transfer of 30 shares to Carl, Jr., and $18,750 [(30/80) x $50,000] of his basis accompanies the deemed gifted shares. Carl's basis in his remaining 50 shares is $31,250 ($50,000 - $18,750). Carl, Jr's basis in his 50 shares is $38,750 ($20,000 + $18,750). pp. C:2-9 through C:2-27.

C:2-27 Bill should consider the following tax issues:

- Was the stock sold to a related party (Sam), as defined by Sec. 267(b)? If so, Bill cannot recognize the loss, and the remaining issues need not be examined. If not, then...
- Is the stock a capital asset?
- Is Bold a qualifying small business corporation?
- If so, does the stock qualify for Sec. 1244 stock treatment?
- If Sec. 1244 stock, what is Bill's marital and filing status?
- Has Bill's basis in the stock changed relative to its initial acquisition cost?
- What is the amount and character of Bill's recognized loss?

Bill's stock sale results in the realization of a $65,000 ($100,000 - $35,000) long-term capital loss. If the purchaser is a related party, Sec. 267(a) precludes Bill from recognizing the loss. Because Bill is the original holder of the stock, the loss may be characterized as ordinary under Sec. 1244, assuming the various requirements of that provision are satisfied. pp. C:2-32 and C:2-33.

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Problems

C:2-28 With the given facts, the C corporation option with the salary payment results in the lowest total tax, as determined in the following analysis:

	Sole Proprietorship	C Corporation With Salary	C Corporation With Dividend	S Corporation With Salary	S Corporation With Distribution
Entity Level:					
Income before salary	$50,000	$50,000	$50,000	$50,000	$50,000
Salary deduction	-0-	(20,000)	-0-	(20,000)	-0-
Taxable income	$50,000	$30,000	$50,000	$30,000	$50,000
Entity level tax	$ -0-	$ 4,500	$ 7,500	$ -0-	$ -0-
Lucia:					
Pass-through income	$50,000	$ -0-	$ -0-	$30,000	$50,000
Salary income	-0-	20,000	-0-	20,000	-0-
Dividend income	-0-	-0-	20,000	-0-	-0-
Total income to Lucia	$50,000	$20,000	$20,000	$50,000	$50,000
Lucia's tax	$12,500[a]	$ 5,000[b]	$ 3,000[c]	$12,500[d]	$12,500[e]
Total Tax	$12.500	$ 9,500	$10,500	$12.500	$12.500

[a]$50,000 x 0.25 = $12,500
[b]$20,000 x 0.25 = $5,000
[c]$20,000 x 0.15 = $3,000
[d]$50,000 x 0.25 = $12,500
[e]$50,000 x 0.25 = $12,500

Because corporate taxable income is low enough to be taxed at 15% and dividends are taxed at 15%, the C corporation options are better than the sole proprietor and S corporation options because, under the latter options, all income is taxed at Lucia's 25% ordinary tax rate. Within the C corporation options, the salary situation is better than the dividend situation because less income is subject to double taxation as a result of the salary deduction. These results apply only to the given factual circumstances. For example, if the corporation's income were taxed at higher marginal tax rates, such as 35% or 39%, the C corporation options would be less attractive than the sole proprietor and S corporation options. pp. C:2-2 through C:2-8.

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C:2-29 a. None. Dick does not recognize his $10,000 realized loss.

b. $60,000 basis in Triton shares received. Dick's holding period begins in 2013.

c. None. Evan does not recognize his $15,000 realized loss.

d. $45,000 basis in Triton shares received. Evan's holding period begins in 2012.

e. Fran recognizes $20,000 of ordinary income.

f. $20,000 basis in Triton shares received. Fran's holding period begins the day after the exchange date in 2015.

g. Triton takes a $50,000 basis in the land and a $30,000 basis in the machinery. Because of the loss property limitation rule, the bases of these assets are reduced to their respective FMVs, assuming the parties do not elect to reduce stock basis. Thus, both assets have a holding period that begins the day after the transfer in 2015. The services, if capitalized, would have a $20,000 basis and a holding period starting in 2015. pp. C:2-9 through C:2-22.

C:2-30 a. $20,000 gain. The Sec. 351 requirements have not been met because 30% of the stock is issued for services. Therefore, Ed recognizes $20,000 ($35,000 - $15,000) of capital gain.

b. $35,000 basis in Jet shares received. Ed's holding period begins on the day after the exchange date.

c. Fran recognizes a $10,000 ($35,000 - $45,000) Sec. 1231 loss.

d. $35,000 basis in Jet shares received. Fran's holding period begins on the day after the exchange date.

e. George recognizes $30,000 of ordinary income.

f. $30,000 basis in Jet shares received. George's holding period begins the day after the exchange date.

g. Jet Corporation takes a $35,000 basis in the land and a $35,000 basis in the machinery. Its holding period for each asset begins the day after the exchange date. The services, if capitalized, would have a $30,000 basis.

h. Because the Sec. 351 requirements would now have been met, the answers change as follows:

a. Ed recognizes no gain or loss.

b. $15,000 basis in the Jet shares received. Ed's holding period begins in 2011.

c. Fran recognizes no loss.

d. $45,000 basis in the Jet shares received. Fran's holding period begins in 2011.

e. George recognizes $25,000 of ordinary income.

f. $30,000 ($5,000 cash + $25,000 FMV of services) basis in the Jet shares received. George's holding period begins the day after the exchange date.

g. Jet's basis in the land and machinery are $15,000 and $35,000, respectively. The loss property limitation rule limits the corporation's basis in the machinery to its FMV. Jet's holding period for the land begins in 2011. The holding period for the machinery begins the day after the exchange date because, by having its basis reduced to FMV, it no longer has a basis that references the transferor's basis before the exchange. The services, if capitalized, would have a $25,000 basis. pp. C:2-12 through C:2-22.

C:2-31 a. The control requirement is not met. Transferors of property receive only 75% and thus do not have 80% control.

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b. The control requirement is met. Robert transferred more than a nominal amount of property. The 80% control requirement has been met since all of Robert's stock is counted for this purpose.

c. The control requirement is not met. Sam owns only 33-1/3% of the Vast stock immediately after the exchange. No stock ownership is attributed from Sam's parents to Sam.

d. The control requirement is met. Charles and Ruth own 100% of the Tiny stock. The transfers do not have to be simultaneous.

e. The control requirement is not met. Charles had a prearranged plan to sell a sufficient amount of shares to fail the control test. Only if Sam were considered to be a transferor (i.e., the sale took place as part of a public offering) would the transaction meet the requirements of Sec. 351. pp. C:2-13 through C:2-16.

C:2-32 a. The control requirement is met. The property transferred by Fred is not considered to be nominal relative to the value of stock received for services. Therefore, Fred and Greta are considered to own 100% of the New stock.

b. The control requirement is not met. For advance ruling purposes, Maureen's shares are not counted towards determining whether the control requirement has been met because the property she contributed was nominal (i.e., does not meet the 10% property minimum of Rev. Proc. 77-37) compared to the value of the stock received for services. The taxpayer may choose to enter into the transaction without an advance ruling, report it as nontaxable, and run the risk of being audited, with the result that the IRS treats the transaction as taxable. Alternatively, Maureen can contribute additional property so that the amount of property equals or exceeds the 10% minimum. The minimum property contribution is $4,545 [$4,545 = 0.1 x ($50,000 - $4,545)]. The $4,545 amount is found by solving the following equation for Property: Property = 0.1 x ($50,000 - Property), which solves to Property = (0.1 x $50,000)/1.1. pp. C:2-13 and C:2-14.

C:2-33 Veronica needs to receive 1,000 additional shares in exchange for $25,000 worth of silver bullion. The 200 shares currently held by Veronica equal 40% of the 500 shares outstanding. To avoid recognizing a gain, Veronica must be "in control" of Poly-Electron immediately after the exchange. Control implies ownership of at least 80% of the total number of Poly-Electron shares outstanding.

The number of additional shares that Veronica must acquire to achieve control can be calculated as follows, where A = additional shares needed:

$$(200 + A) / (500 + A) = 0.80$$
$$200 + A = 0.80 \times (500 + A)$$
$$200 + A = 400 + 0 .80 A$$
$$0.20 A = 200$$
$$A = 1{,}000 \text{ additional shares}$$

Thus, with the additional 1,000 shares, Veronica will have 80% control after the exchange (i.e., 1,200 / 1,500 = 80%.) If each share is worth $25, the value of silver bullion that Veronica must contribute is $25,000 (1,000 shares x $25). Having achieved control, Veronica's exchange will qualify for nontaxable treatment under Sec. 351. pp. C:2-13 through C:2-15.

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C:2-34 a. No. The exchange does not qualify as nontaxable under Sec. 351 because Al and Bob do not control West Corporation. (Al owns only 1,000/1,300 = 76.9% of the voting common stock while Bob owns 100% of the nonvoting preferred stock). Al recognizes $25,000 of gain on the transfer of the patent. His basis in his West stock is $25,000. Bob recognizes no gain or loss because he contributed cash. His basis in the preferred stock is $25,000. Carl recognizes $7,500 of ordinary income. His basis in his West stock is $7,500. West recognizes no gain or loss on the exchange. Its basis for the assets is: cash, $25,000; patent, $25,000; and services, $7,500.

b. Nontaxable. The exchange now qualifies as nontaxable under Sec. 351 because Al and Bob together own 1,200/1,500 = 80% of the voting common stock and 100% of the nonvoting preferred stock. Al recognizes no gain or loss, and his basis in his West stock is zero. Bob recognizes no gain or loss, and his basis in his West stock is $25,000. Carl recognizes $7,500 of ordinary income, and his basis in his West stock is $7,500. The consequences to West are the same as in Part a, except the basis for the patent is zero instead of $25,000.

c. Nontaxable. The exchange apparently would qualify under Sec. 351. Assuming the $800 of cash contributed is acceptable under Rev. Proc. 77-37 because it meets the 10% property minimum for advance ruling purposes, Al and Bob would recognize no gain or loss. Carl would recognize $6,700 of ordinary income. The consequences to West are the same as in Part b except the cash contributed by Carl takes an $800 basis and the services generate $6,700 of taxable income. pp. C:2-13 through C:2-16.

C:2-35

	Cash	Equipment	Building	Land	Total
FMV of assets	$ 5,000	$90,000	$40,000	$30,000	$165,000
Fraction of total value	0.030303	0.545455	0.242424	0.181818	1.0000
FMV of stock received	$ 3,788	$68,182	$30,303	$22,727	$125,000
Plus: Boot property	1,212	21,818	9,697	7,273	40,000
Total proceeds	$ 5,000	$90,000	$40,000	$30,000	$165,000
Minus: Adj. basis of assets	(5,000)	(60,000)	(51,000)	(24,000)	(140,000)
Gain (loss) realized	$ -0-	$30,000	($11,000)	$ 6,000	$ 25,000
Allocation of boot	$ 1,212	$21,818	$ 9,697	$ 7,273	$ 40,000
Gain recognized	$ -0-	$21,818	$ -0-	$ 6,000	$ 27,818

a. $27,818 gain recognized:

Gain on equipment, ordinary income (recapture on Sec. 1245 property)	$21,818
Gain on land, Sec. 1231 gain	6,000
Total gain recognized	$27,818

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b. $40,000 basis in stock:

Adj. basis of property transferred	$140,000
Minus: FMV of boot received	(40,000)
Plus: Gain recognized by transferor	27,818
Basis in stock	$127,818
Basis in interest-bearing notes ($10,000 each):	$ 40,000

c. $165,000 total basis in the property received:

	Tom's Basis	Recog. Gain	Reduction*	Total
Cash	$ 5,000	$ -0-	$ -0-	$ 5,000
Equipment	60,000	21,818	-0-	81,818
Building	51,000	-0-	(2,818)	48,182
Land	24,000	6,000	-0-	30,000
Total	$140,000	$27,818	$(2,818)	$165,000

*Total adjusted basis = $167,818 ($140,000 + $27,818); total FMV = $165,000. Thus, the reduction under Sec. 362(e)(2) = $2,818 ($167,818 - $165,000). Reg. Sec. 1.362-4(g)(2)(ii), adjusted basis includes the increase for gain recognized by the shareholder.

pp. C:2-16 through C:2-22.

C:2-36 $15,000. Ann must recognize $15,000 ($25,000 - $10,000) of gain on the exchange. To comply with the advance ruling requirements of Rev. Proc. 77-37, Fred must receive more than a nominal amount of stock in exchange for his property. If Fred obtained additional stock worth at least 10% of the value of the stock he already owned (i.e., at least five shares of stock in exchange for $5,000), his stock likely would be counted for control purposes, and the Sec. 351 requirements would be met. Ann may choose to enter into the transaction without increasing her property contribution so as to acquire at least 80% of Zero's stock or without having Fred increase his contribution to at least $5,000, proceed without an advance ruling, and report the transaction as being nontaxable. Ann and Fred then run the risk of being audited and the IRS's arguing the transaction is taxable. pp. C:2-14 and C:2-15.

C:2-37 $4,000. Lucy recognizes $4,000 ($12,000 - $8,000) gain on the exchange because she owns less than 80% of the stock immediately after the exchange [(50+10)/110=54.5%]. To qualify under Sec. 351:
(1) Lucy could contribute additional property for enough additional stock to obtain 80% control. To meet the 80% control requirement, she would have to purchase an additional 150 shares to own 200 shares (of the 250 shares outstanding).
(2) Marvin could exchange enough property as part of the same transaction to qualify as a transferor under Sec. 351. For advance ruling purposes under Rev. Proc. 77-37, Marvin would have to contribute at least $6,000 for an additional five shares of stock to be considered a transferor of property. The taxpayers may choose to engage in the transaction without Lucy's and Marvin's increasing their property contributions, proceed without an advance ruling, and report it as being

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nontaxable. However, they would run the risk of being audited and the IRS's arguing the transaction is taxable. pp. C:2-14 and C:2-15.

C:2-38 a. None. Neither Jerry nor Frank recognizes any gain or loss on the exchange because the Sec. 351 requirements have been met.

b. $44,000. Because the exchange is disproportionate, Frank probably could be deemed to have made a gift of 25 shares of Texas stock to Jerry. Jerry's basis in his 75 shares is $44,000 ($28,000 basis in property transferred by Jerry + $16,000 basis in the 25 shares received from Frank). This calculation presumes that no gift taxes are paid on the transfer. If gift taxes are paid, a second basis adjustment may be needed for the portion of the gift tax attributable to the appreciation.

c. $16,000. Frank's basis in his 25 Texas shares is $16,000 [$32,000 basis in property transferred x (25/50)]. pp. C:2-15 and C:2-16.

C:2-39 a. $20,000 capital gain:

Amount realized	$170,000
Minus: Basis in land	(30,000)
Realized gain	$140,000
Boot received (note)	$ 20,000
Gain recognized (capital in character)	$ 20,000

b. $30,000. Basis of common stock and preferred stock: $30,000 + $20,000 - $20,000 = $30,000. This basis must be allocated to the common and preferred stock based on their relative fair market values.

Basis of common stock: $\frac{\$100,000}{\$150,000}$ x $30,000 = $20,000

Basis of preferred stock: $\frac{\$50,000}{\$150,000}$ x $30,000 = $10,000

Basis of short-term note: $20,000 (FMV).

c. Basis of land to Temple Corporation: $50,000 = $30,000 + $20,000

pp. C:2-16 through C:2-22.

C:2-40 a. None for Karen and Larry; $7,000 capital gain to Joe. Karen and Larry recognize no gain or loss under Sec. 351 because they receive only stock. Joe recognizes a $7,000 ($15,000 - $8,000) capital gain because he receives only notes and therefore does not qualify for Sec. 351 treatment.

b. Joe's basis in the notes is $15,000. Karen's basis in the stock is $18,000. Larry's basis in the stock is $25,000.

c. Gray Corporation's basis in the land is $15,000. Gray's basis in the equipment is $18,000. The $10,000 of depreciation recapture potential is inherited by Gray because Karen does not recognize a gain on the asset transfer. pp. C:2-16 through C:2-19.

C:2-41 a. $4,000 gain. Nora realizes a $7,000 gain [($18,000 + $4,000) - $15,000] and must recognize a gain of $4,000, the amount of the boot (note) received. Of the $4,000 gain, $3,000 is ordinary income recaptured under Sec. 1245. The remaining $1,000 is a Sec. 1231 gain.

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b. $4,000 and $15,000. Nora's basis in the note is $4,000, its FMV. Nora's basis in the stock is $15,000 ($15,000 + $4,000 gain - $4,000 FMV of note).

c. $19,000. Needle Corporation's basis in the machinery is $19,000 ($15,000 + $4,000 gain recognized). pp. C:2-16 through C:2-22 and C:2-25 through C:2-27.

C:2-42 a. $3,000 of ordinary income: Jim realizes a $3,500 [($5,000 + $1,000 + $2,000) - $4,500] gain and recognizes a $3,000 gain. Because the $2,000 education loan assumed by Gold Corporation has no apparent business purpose, all liabilities transferred to Gold are treated as boot under Sec. 357(b). All of Jim's gain is ordinary income recaptured under Sec. 1245.

b. $4,500. Jim's basis in his stock is $4,500 ($4,500 + $3,000 - $3,000).

c. Jim's holding period for the additional shares includes his holding period for the automobile.

d. $7,500. Gold's basis in the automobile is $7,500 ($4,500 + $3,000). pp. C:2-22 and C:2-23.

C:2-43 a. $3,000 of ordinary income, determined as follows:

Stock (FMV) received		$17,000
Release from liability		28,000
Amount realized		$45,000
Minus: Basis of property transferred		
Machinery	$15,000	
Money	10,000	(25,000)
Realized gain		$20,000
Liability assumed		$28,000
Minus: Basis of all property transferred		(25,000)
Recognized gain (Sec. 357(c))		$ 3,000

The gain is treated as ordinary income under Sec. 1245 recapture rules.

b. Zero basis:

Property transferred	$25,000
Minus: Boot received (including liability)	(28,000)
Plus: Gain recognized	3,000
Basis in Moore stock	$ -0-

c. $18,000 basis:

Barbara's basis in the machine	$15,000
Plus: Barbara's recognized gain	3,000
Moore corporation's total basis in machinery	$18,000

d. Sam recognizes no gain or loss.

e. $17,000 basis, the amount of money he contributed to Moore for the stock.

f. Barbara's holding period for her stock includes her holding period for the machinery. Sam's holding period starts on the day after the exchange date.

g. Sec. 351 would not apply, so the answers would change as follows:

a. $20,000 ordinary income. Barbara would recognize $20,000 of ordinary income recaptured under Sec. 1245.

b. $17,000 basis. Barbara's basis in the stock would be $17,000, its FMV.

c. $35,000 basis. Moore's basis in the machinery would be $35,000, its FMV.

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d. $17,000 ordinary income. Sam would recognize $17,000 of ordinary income from compensation.
e. $17,000 basis. Sam's basis in the Moore stock would be $17,000, its FMV.
f. Sam's holding period for his stock would start on the day after the exchange date. Barbara's stock would have a split holding period because she contributed both Sec. 1231 property and cash.

pp. C:2-24 and C:2-25.

C:2-44 a. $3,000 gain recognized. Jerry realizes an $18,000 [($15,000 + $35,000) - $32,000] gain and recognizes a $3,000 ($35,000 - $32,000) gain because the liabilities exceed the property's basis (Sec. 357(c)).
b. Zero basis. Jerry's basis in his Emerald stock is zero ($32,000 + $3,000 - $35,000).
c. $35,000 basis. Emerald's basis in the property is $35,000 ($32,000 + $3,000).
d. a. No gain or loss. Jerry recognizes no gain or loss because the liabilities are not considered boot and do not exceed the basis of property contributed.
b. $17,000 basis. Jerry's basis in his Emerald stock is $17,000 ($32,000 - $15,000).
c. $32,000 basis. Emerald's basis in the property is $32,000.

pp. C:2-22 through C:2-25.

C:2-45 a. No gain or loss recognized. Ted realizes a $70,000 ([$60,000 + $35,000 + $15,000] - [$5,000 + $35,000]) gain, but Ted recognizes no gain or loss. Section 357(c)(3) precludes Ted from recognizing a gain because of his "excess" liability situation (i.e., liabilities that total $50,000 exceeding the $40,000 total bases of the assets).
b. $25,000 basis. Ted's basis in the stock received is $25,000 ($40,000 - $15,000). No reduction in basis is required for liabilities assumed by the transferee corporation under Sec. 357(c)(3) or under Sec. 358(d)(2).
c. $40,000 basis. The corporation's basis in the assets is the same $40,000 basis that Ted had ($5,000 in the cash, zero in the accounts receivable, and $35,000 in the equipment).
d. The corporation. The corporation must recognize the income from the receivables when it collects on them. The corporation also can deduct the current liabilities when it pays them (Rev. Rul. 80-198, 1980-2 C.B. 13). pp. C:2-24 and C:2-25.

C:2-46 a. $10,000 of ordinary income. Mary realizes a $50,000 ($110,000 - $60,000) gain but recognizes a $10,000 gain (amount of boot received). The gain is treated as ordinary income under the Sec. 1245 recapture rules.
b. $60,000 basis. Mary's basis in the Green stock is $62,000 ($60,000 + $10,000 - $10,000). Her holding period for the stock begins on March 3, 2012. Mary's basis in the two-year note (boot) is $10,000, its FMV. Her holding period for the note begins on the day after the exchange date, or January 11, 2015.
c. Green recognizes no gain or loss.

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d. $70,000 basis. Green's basis in the machine is $70,000 ($60,000 basis to Mary + $10,000 gain recognized by Mary). Green's holding period begins on March 3, 2012. pp. C:2-17 through C:2-21, C:2-25, and C:2-26.

C:2-47 a. None. Ace Corporation reports no income.

b. Ace takes a zero basis in the land.

c. Ace reports no income when it receives the cash. The basis of the equipment purchased with the $100,000 contribution is its $250,000 purchase price minus the $100,000 of contributed funds, or $150,000. p. C:2-31.

C:2-48 a. Kobe recognizes a $70,000 dividend, which is taxed at the applicable capital gains tax rate, and Bryant Corporation reports taxable income of $120,000. Bryant may not deduct the dividend paid to Kobe.

b. Kobe recognizes interest income of $20,000, which is taxed at his ordinary tax rate. The principal repayment is not taxable to Kobe. Bryant reports taxable income of $100,000 because it gets a $20,000 deduction for the interest paid to Kobe. pp. C:2-27 through C:2-30.

C:2-49 a. $75,000 capital loss to each shareholder. The $75,000 loss with respect to the stock investments is capital in character for both Tom and Vicki because they did not purchase the stock from the corporation. Because the $25,000 debts are secured by bonds, the worthless security rules of Sec. 165(g)(1) apply and their losses will be capital in character.

b. STCG to Vicki; ordinary loss to Tom. If the liability were not secured by bonds, Vicki's loan would be related solely to her stock investment and should be treated as a nonbusiness bad debt that is deductible as a short-term capital loss (up to $3,000 a year after netting capital losses against capital gains). An argument can be made that Tom's loss would relate to an attempt to maintain his employment with Guest Corporation and, therefore, has a substantial business purpose. Such a loss would be deductible as an ordinary loss if the dominant motive for making the loan were related to his employment activities.

c. Limited ordinary loss on stock; capital loss on bonds. The loss with respect to the stock investment would be ordinary in character under Sec. 1244 for both Tom and Vicki up to the $100,000 annual limit for the couple because they purchased the stock directly from Guest. The $50,000 loss exceeding the $100,000 Sec. 1244 limit would be capital in character. The worthless security rules of Sec. 165(g)(1) still would apply to the $25,000 losses on the bond investments. These losses would be capital in character. pp. C:2-32 through C:2-34.

C:2-50 Harry: Ordinary loss of $50,000 under Sec. 1244 and LTCL of $75,000.

Susan: LTCL of $175,000.

Big Corporation: $125,000 LTCL. pp. C:2-32 through C:2-34.

C:2-51 a. $50,000 ordinary loss and $2,000 LTCL. Lois's loss is $52,000 ($28,000 - $80,000 basis), of which $50,000 (the limit for a single taxpayer) is ordinary under Sec. 1244. The remaining $2,000 is a long-term capital loss.

b. $42,000 ordinary loss and $10,000 LTCL. Lois's loss still would be $52,000 ($28,000 - $80,000 basis). However, for purposes of computing the Sec. 1244 loss, Lois's basis in the stock would be $70,000. Therefore, the ordinary loss under Sec. 1244 would be $42,000 ($28,000 - $70,000). The remaining $10,000 would be a long-term capital loss. pp. C:2-32 through C:2-34.

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C:2-52 $52,000 LTCL. The entire loss is capital in character because Sue was not the original owner of the stock; therefore, the stock is no longer Sec. 1244 stock. pp. C:2-32 through C:2-34.

C:2-53 a. Donna recognizes no gain when she transfers the land to Development Corporation. Development's basis in the land will be $150,000. All gain on the subsequent sale will be ordinary income to Development. This alternative results in the pre-contribution gain that accrued prior to Donna's transfer and the post-contribution profit earned from subdividing the land being taxed at a 34% marginal tax rate.

b. Donna could transfer the land to Development in exchange for stock and $330,000 of debt instruments. In this case, Donna would recognize $330,000 of long-term capital gain and Development's basis in the land would be $480,000. The $330,000 of pre-contribution capital gain (net of any capital losses that Donna has recognized) is taxed at the applicable capital gains tax rate (in this case, 23.8%, including the 3.8% net investment tax). The step-up in basis permits Development to use the additional basis to offset income earned from subdividing the land that otherwise would be taxed at a 34% marginal tax rate. Author's Note: The basic scenario apparently would permit Donna's gain to be reported using the installment method. However, sale of the land by a related person (a corporation controlled by Donna) within two years of the transfer date precludes deferral of the installment gain (Sec. 453(e)). pp. C:2-34 through C:2-36.

Comprehensive Problems

C:2-54 a. Yes. The transaction meets the requirements of Sec. 351. Transferors of property (Alice, Bob, and Carla) own 88.2% (750/850 = 0.882) of the Bear stock.

b. Alice recognizes a $10,000 gain, the amount by which the $60,000 mortgage assumed by Bear Corporation exceeds the $50,000 basis ($12,000 + $38,000) of all the assets transferred by Alice. The character is Sec. 1231 gain, of which some would be Sec. 1250 gain because of depreciation claimed on the building. Bob recognizes $10,000 of gain (the lesser of his realized gain of $15,000 or the boot received of $10,000). The gain is treated as ordinary income recaptured under Sec. 1245. Carla recognizes no gain or loss even though she received cash because she realized a $5,000 loss. Dick recognizes $10,000 of ordinary income as compensation for his services. Bear recognizes no gain or loss on issuing its stock or the note.

c. Alice's basis in her stock is zero ($12,000 + $38,000 - $60,000 liabilities + $10,000 gain). Her holding period for the stock includes her holding period for the land and building. Each share of stock, therefore, has a split holding period. Bob's stock basis is $25,000 ($25,000 + $10,000 gain - $10,000 boot). His holding period for his stock includes his holding period for the equipment. Carla's basis for her stock is $10,000 ($15,000 - $5,000 boot). Her holding period for the stock includes her holding period for the van. Dick's basis in his stock is $10,000. His holding period begins on the day after the exchange date.

d. Bear's basis in the assets received is: land $15,000 [$12,000 + (0.30 x $10,000)] and building $45,000 [$38,000 + (0.70 x $10,000)]. (The gain is allocated between the land and building according to the two assets' relative FMVs as prescribed by the Sec. 357 Treasury Regulations.) The holding period for the land and building includes the time Alice held these properties. Equipment basis is $35,000 ($25,000 + $10,000). Holding period includes the time that Bob owned the properties. Van basis is $10,000, limited to the van's FMV. If Bear and Carla elect, Bear can take a $15,000 basis in the van, but Carla's basis in her stock would be limited to $5,000, its FMV. Holding period begins the day after the exchange date because the van takes a FMV basis. The

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accounting services are deductible by Bear if incurred after operations have begun. If the expenses are pre-operating expenses, they should be amortizable under Sec. 248. pp. C:2-12 through C:2-27.

C:2-55 a. No. The transaction does not meet the requirements of Sec. 351. Transferors of property, Eric and Florence, own only 75% (750/1,000 = .75) of the Wildcat stock, which fails the 80% test.

b. Eric recognizes a $150,000 capital loss on the land ($50,000 FMV - $200,000 basis). Florence recognizes a $25,000 gain ($25,000 FMV - $0 basis) on the equipment. The gain is treated as ordinary income under Sec. 1245 recapture rules. George recognizes $25,000 of ordinary income as compensation for his services. Wildcat Corporation recognizes no gain or loss on issuing its stock for property or services.

c. Eric's basis in his stock is $50,000, its FMV. Florence's basis in her stock is $25,000, its FMV. George's basis in his stock is $25,000, its FMV. They each have a holding period that begins the day after the exchange date.

d. Wildcat's bases in the assets received are as follows: land $50,000 (FMV) and equipment $25,000 (FMV). The holding period for the land and equipment begins the day after the exchange date. The legal services may be deductible by Wildcat if incurred after operations have begun. They might have to be amortized over a period of time depending on when they were incurred and for what they were incurred. Also, if George has not yet performed the services, deduction may be deferred until economic performance occurs. pp. C:2-12 through C:2-27.

Tax Strategy Problems

C:2-56 a. The circumstances vary for the shareholders, who may or may not be pleased with this result. They have avoided the requirements of Sec. 351, which allows Eric to recognize a $150,000 capital loss. Although Florence has to recognize $25,000 of ordinary income, Wildcat can depreciate the machinery's FMV of $25,000. If Eric can use the $150,000 loss to offset capital gains from other sources, he may be happy with this result. If Florence is in a low tax bracket, she might not mind that she has to recognize $25,000 of ordinary income. However, if Eric has no capital gains and cannot use the $150,000 capital loss, avoiding Sec. 351 may not be a desirable result. This is especially true if Wildcat plans to subdivide the land and sell it, thereby generating ordinary income in the near future. If Sec. 351 applied, Wildcat's basis in the land would be limited under the Sec. 362(e)(2) reduction rules to $50,000, its FMV. However, Eric and Wildcat Corporation could make an election under Sec. 362(e)(2)(C) so that the land would have a $200,000 carryover basis to Wildcat and, therefore, much less income for Wildcat to report in future years. In such case, Eric's basis would be limited to his stock's FMV of $50,000 rather than the $200,000 basis in the property contributed. If he is not planning to sell his stock anytime soon, this reduction might not matter. Also, Florence could avoid recognizing $25,000 of ordinary income on the machinery. On the other hand, the machinery would have a zero basis to Wildcat, and therefore Wildcat would not be allowed any depreciation on the machinery. As far as George is concerned, it makes no difference to him whether Sec. 351 applies or not. The result to him is the same either way. pp. C:2-21 and C:2-22.

b. If the shareholders decide that meeting the Sec. 351 requirements would produce a greater tax benefit, they can proceed in several ways. For example:

1. The corporation could give George 150 shares of stock worth $15,000 and $10,000 of bonds. In such case Eric and Florence would own more than 80% (750/900 = 0.83) of the stock.

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2. Florence and Eric each could contribute an additional $15,000 for 150 shares of stock. In such case, Eric and Florence would own more than 80% (1,050/1,300 = 0.808) of the stock.
3. George could contribute $2,500 of cash in addition to his services for 25 more shares. Thus, he would be a property contributor allowing all his shares to count in the 80% test. In such case, Eric, Florence, and George would own 100% of the stock.

C:2-57 a. Advantages of Alternative a:

1. Simplicity. Each person gets stock equal to her contribution to capital and will share in any appreciation in value in proportion to her contribution.
2. Paula recognizes no gain on the transaction because she received no boot.
3. The stock will be Sec. 1244 stock so, if Paula or Mary sells the stock at a loss or the business becomes bankrupt, at least some of the loss will be an ordinary loss.
4. The corporation, with the shareholders' consent, can elect S corporation status for the first two years, so the losses flow through to the shareholders to offset income from other sources. Later, the corporation, with the shareholders' consent, can revoke the S corporation election to become a regular C corporation.

Disadvantages of Alternative a:

1. All distributions to Paula and Mary (above reasonable salaries) will be taxed as dividends to the shareholders and are not deductible by the corporation.
2. Mary may want additional assurance that she will have preference in getting her investment back before the corporation pays any dividends. Since Paula has a majority ownership, she can decide when and if the corporation pays any dividends.
3. Paula may not want to share ownership with Mary. She might prefer that Mary's investment be treated as a loan so that all future appreciation accrues to her (Paula).

b. Advantages of Alternative b:

1. Paula recognizes no gain on the transaction.
2. Mary is assured of a return of her investment on whatever terms are specified in the debt instrument, plus a return of 8% for ten years (provided the corporation does not go bankrupt).
3. Even if the corporation becomes bankrupt, Mary will have first call on any assets before Paula since Mary is a creditor.
4. Paula owns all the stock and benefits from the company's appreciation in value.
5. Paula's stock is Sec. 1244 stock.
6. The corporation, with Paula's consent, can elect S corporation status for the first two years, which allows Paula to use losses to offset income from other sources.
7. The corporation gets a deduction for the interest paid to Mary.
8. Mary's income is limited to the note interest. She is not taxed on the return of her principal.

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Disadvantages of Alternative b:

1. Mary may want to participate in the anticipated growth of the company. She might prefer some stock in addition to some notes.
2. All distributions to Paula (above salary) are taxed as dividends and are not deductible by the corporation.
3. In the event of bankruptcy, Mary's loss is capital in character.

c. Advantages of Alternative c:

1. Both Paula and Mary share in any stock appreciation.
2. The interest paid to Paula and Mary is deductible by the corporation. Their income does not include any principal payments.
3. The stock is Sec. 1244 stock, so Mary and Paula each would have an ordinary loss for at least part of their investment.
4. The corporation, with the shareholders' consent, can elect S corporation status and pass through losses during the first two years. Later, the corporation, with the shareholders' consent, can revoke the S corporation election.

Disadvantages of Alternative c:

1. For Paula, receipt of the note would be considered the receipt of boot, and she would have to recognize gain to the extent of $100,000 FMV of the note received, possibly over the ten-year period under the installment method.
2. Paula might not want to share ownership with Mary.
3. Mary might prefer a more secure return of her investment as in Alternative b even if she cannot participate in future growth of the corporation.
4. The IRS might try to reclassify the debt as equity, thereby changing its tax characteristics and possibly jeopardizing the S corporation election, if one has been made.

d. Advantages of Alternative d:

1. Paula recognizes no gain on the exchange.
2. All stock is Sec. 1244 stock.
3. Paula owns all the common stock and is entitled to the company's appreciation in value. If she is willing to share some of this appreciation, the preferred stock could be made participating preferred stock.

Disadvantages of Alternative d:

1. Mary has no assured return because the corporation might not pay dividends. However, she is more assured of payment than with common stock since the stock is cumulative.
2. Mary does not participate in the growth of the corporation. However, if they agree, the preferred stock can be participating.
3. The corporation cannot elect S corporation status because it has issued more than one class of stock.
4. All distributions to Paula and Mary (above any salaries) are taxable to them as dividends and not deductible by the corporation.

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In general, no one plan is ideal. Paula and Mary must take into consideration the following factors:

1. How much of the future appreciation in growth is Paula willing to share with Mary?
2. How much assurance does Mary want that she will have first claim on assets to repay her investment? How willing is she to be a minority shareholder or would she rather be a creditor?
3. How large a risk exists that the corporation will go bankrupt so that Paula and Mary want their ownership stakes to be Sec. 1244 stock?
4. How willing is Paula to recognize gain on the corporate formation?

C:2-58 a. A "pass-through" entity. In light of the nursery's projected losses over the next two years, Paula and Mary might consider organizing the business as an S corporation, a general partnership, a limited partnership, or a limited liability company. With respect to all these forms, losses generated at the entity level would pass through to Paula's and Mary's separate returns. As a result, Paula and Mary could use a pro rata share of the entity's loss to offset income they earn over the next two years. In the case of a C corporation, losses generated at the entity level would carry back or forward to offset the corporation's income in other years. Paula and Mary could not use such losses to offset income they earn over the next two years.

b. As a type of partnership. To achieve their various business and investment objectives, and in light of their proposed use of debt and equity, Paula and Mary might structure the partnership as either a limited partnership or as a general partnership that makes a special allocation.

A limited partnership would give either investor the opportunity to trade her general partnership right to manage the business (analogous to common stock ownership) for a limited partnership right to a fixed rate of return (analogous to preferred stock ownership). A limited partnership also would give either investor the opportunity to become a general creditor of the partnership (analogous to a corporate bondholder).

In the case of a general partnership, so long as the special allocation has substantial economic effect (see Chapter C:9) this business form would give either investor the opportunity to trade her general partnership right to residual profits (analogous to common stock ownership) for a more limited right to a fixed rate of return (analogous to preferred stock ownership). It also would give either investor the opportunity to become a general creditor of the partnership (analogous to a corporate bondholder).

Although the general partner in either partnership form would have unlimited liability, a limited liability company taxed by default as a general partnership would afford all its members limited liability.

Case Study Problems

C:2-59 Listed below are the major points that should be covered in the memorandum to Bob. The student should incorporate those points into a properly structured memorandum using good form with proper grammar and punctuation.

In the client memorandum, before discussing the tax advantages and disadvantages of incorporating, the student might discuss the nontax advantages of incorporating (e.g., limited liability, ease of transferring ownership interest, etc.).

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With the popularity of limited liability companies (LLCs), some consideration should be given to this business form. All states have adopted LLC legislation. Because most of Bob's business will be done within a single state, interstate activities and the lack of a common body of LLC rules among states will not be an issue.

The adoption of the final check-the-box regulations means that C corporation tax treatment is not limited to incorporated entities. Some discussion of the tax implications of the check-the-box regulations for an existing entity (a proprietorship) should be mentioned in the memorandum.

Incorporation

1. A corporate formation in which Bob receives only stock is nontaxable. Bob will recognize no gain or loss on the asset transfer. The transfer of property by either of the new investors should be properly timed since nontaxable transfers to existing corporations are difficult to accomplish because of the 80% control requirement. Timing is less important if the new investors are contributing cash and their contributions are to be made after Bob's contribution.

2. Bob likely will desire to continue to use the calendar year as the corporation's tax year because there appears to be little advantage of changing to a fiscal year.

3. Bob likely will desire to continue the cash method of accounting as the corporation's overall method of accounting because of its simplicity, assuming the small business exception under Sec. 448 applies if he operates the business as a C corporation.

4. Bob will continue to use the same depreciation method and convention once he transfers the building and equipment to the corporation. The depreciation recapture potential carries over from the proprietorship to the corporation. Depreciation for the year of transfer should be divided between Bob and the corporation.

5. The income from collecting the accounts receivable and accounts payable items that represent deductible expenses are reported by the corporation. The income is recognized when the corporation collects the receivables. The expenses are deducted when the corporation pays the liability.

6. Consideration should be given to an S corporation election. A C corporation will permit a tax savings for the first $75,000 of corporate taxable income but may trigger double taxation if the earnings are distributed as a dividend, although the dividends will be taxed at the applicable capital gains rate. The S corporation election will permit all the earnings to be taxed at the individual tax rates (which may be lower than the corporate tax rates) and avoid the possibility of double taxation.

7. By retaining C corporation status Bob would be permitted to exclude 50%, 75%, or 100% (depending on the acquisition date) of the gain recognized on the sale or exchange of qualified small business corporation stock that has been held for more than five years. The included gain is taxed at 28%, making the effective rate on the entire gain 14%, 7.84%, or 0%. Even if the stock were held less than five years, but more than one year, Bob's gain

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would be taxed at the applicable capital gains rate. This advantage is not available to an S corporation whose shareholders instead increase the basis of their stock by the amount of any earnings retained in the business.

8. The salary paid to Bob should be reviewed to make sure it is reasonable. The employment taxes paid on the salary are about the same as the self-employment tax liability incurred with the sole proprietorship.

9. Consideration should be given to the availability of fringe benefits for Bob from either the C or S corporation business form. In general, the treatment of these fringe benefits—accident and health benefit premiums, etc.—are treated like guaranteed payments or salary for partners and 2%-or-more-shareholders of an S corporation. (See Chapter C:11.)

10. Consideration should be given to a retirement plan for Bob. He can make deductible contributions to an IRA, or perhaps establish a qualified plan if he makes the S corporation election.

Capital Structure

1. The simplest capital structure is to have solely common stock issued to Bob and/or either of the other individuals who are interested in investing in the business. Common stock may be attractive to the individual who desires to be active in the business. Bob may prefer to issue preferred stock or debt to the individual who is interested only in investing in the business. The preferred stock could provide a guaranteed dividend payment for the investor. Preferred stock, however, may prevent an S corporation election.

2. The preferred or common stock should qualify for Sec. 1244 treatment. Section 1244 permits an ordinary loss to be claimed on the sale, exchange, or worthlessness of the stock.

3. The use of debt will permit the payment of a deductible interest payment to the debt holder. The receipt of debt as part of the incorporation transaction will trigger the recognition of part or all of the transferor's realized gain.

4. The use of debt will permit the repayment to be partially or totally nontaxable. Unlike stock, which need not be retired, debt usually is retired at a designated maturity date.

5. Bob should consider whether he should transfer the building and equipment to the corporation as part of the incorporation transaction. Some tax advantages may exist with Bob retaining title to the property and leasing it to the corporation. Keeping the property outside the business and leasing it to the corporation also prevents the possible taking of the property by the corporation's creditors if financial difficulties arise.

Although the above discussion has been couched in terms of using a corporation or an LLC primarily to obtain tax advantages, one probably also should explain that LLCs and partnerships can be taxed as a C corporation under the check-the-box regulations. This change will provide greater flexibility for selecting the business entity form.

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Depending on the length of the assignment, the student might compare the partnership, corporation, and LLC forms of doing business because it is not entirely obvious from the facts that the corporate form is superior to the partnership form.

C:2-60 Among the information that the transferor must provide the IRS are statements about the property transferred and its adjusted basis to the transferor. In addition, a statement about the liabilities transferred to the corporation including the nature of the liabilities, when and why they were created, and the corporate business reason for the transfer must be attached to the transferor's return for the year of the transfer (see Reg. Sec. 1.351-3(a). Similar information must be attached to the transferee corporation's tax return for the year of transfer (see Reg. Sec. 1.351-3(b).

From the facts of the problem, the funds obtained from placing the mortgage on the building and land apparently has been used for personal purposes. Withdrawals from a sole proprietorship, however, are not a taxable event for Eric Wright. The transfer of the mortgage to the corporation, however, may be a taxable event if the IRS can prove that the acquisition or assumption of the liability by the corporation had a tax avoidance motive or lacked the necessary business purpose. In such a situation, all the liabilities assumed and acquired by the corporation would be boot property. On the other hand, a factor in favor of the taxpayer not being subject to Sec. 357(b) is that one year has passed between the time the mortgage was taken out and the time it was transferred to the corporation.

The tax practitioner should thoroughly research the issue before reaching a conclusion. Should he or she find Sec. 357(b) is applicable, he or she should not agree to the client's position since the AICPA's Statements on Standards for Tax Services (SSTS) No. 1, Tax Return Positions, Para. 5a (reproduced in Appendix E) holds that a CPA should not recommend to a client that a position be taken with respect to the tax treatment of any item on a return unless the CPA has a good faith belief that the position has a realistic possibility of being sustained administratively or judicially on its merits if challenged. Eric's situation may lie in a gray area but, if sufficient authority exists for saying the necessary business purpose is present, the CPA may prepare Eric's return and not report any gain under Sec. 357(b). If the position does not have a reasonable basis, SSTS No. 1, Paragraph 5b, also would prevent the CPA from signing either Eric's personal return or the corporate return unless the liability is appropriately disclosed on the two returns. Thus, even if the position is disclosed, the CPA may not sign the return if the position does not have a reasonable basis.

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Tax Research Problems

C:2-61 The memorandum should explain why the transaction meets the requirements of Sec. 351. Under Reg. Sec. 1.351-1(a)(3), stock underwriters may be disregarded for purposes of Sec. 351 if the underwriter is an agent of the corporation or the underwriter's ownership of the stock is transitory. If a person acquires stock from an underwriter in exchange for cash in a qualified underwriting transaction, the person who acquires the stock is treated as transferring cash directly to the corporation in exchange for the stock and the underwriter is disregarded.

C:2-62 The memorandum should point out that the transfers of property to a controlled corporation are nontaxable only if the transferors control the transferee corporation immediately after the exchange (Sec. 351(a)). Section 368(c) defines control in terms of two 80% tests. Regulation Sec. 1.351-1(a) outlines some of the requirements of the control test but does not directly address the question of a prearranged binding agreement whereby one transferor sells one-half of his stock to someone who is not a transferor. Example (1) of Reg. Sec. 1.351-1(b) permits a transfer to qualify under Sec. 351 where transferee corporation stock is transferred by gift from a controlling transferor to his son, who also is a transferor, immediately after the exchange. Regulation Sec. 1.351-1(a)(1)(ii) permits a shareholder to be ignored as a transferor when the amount of stock issued directly for property is of relatively small value in comparison to the value of the stock already owned or to be received by the person who transferred the property.

Under Rev. Rul. 79-194, 1979-1 C.B. 145, the control requirement of Sec. 351(a) is to be determined after any sales or transfers occur. In Situation 1 of this ruling, the control requirement is satisfied when part of the 80% stock interest in a newly created corporation that was acquired by a transferor corporation was sold to a group of investors who had acquired the other 20% stock interest in the original transaction. In this situation, the shift in ownership occurred among individuals who were transferors, and the recipients owned a substantial amount of the corporation's stock.

In a second situation, described in Rev. Rul. 79-194, the control requirement was not met upon completion of a sale under a similar agreement, whereby a transferor who originally had acquired 99% of the stock sold one-half the stock of the new corporation to a second transferor who had originally acquired only 1% of the stock. The IRS held that the control requirement was not met because the 1% shareholder received stock of small value in the original transfer relative to the amount received in total and, therefore, was not considered to be a transferor.

In the current case, it must be determined whether Bob has received a substantial part of the Stone Corporation stock or not. Revenue Procedure 77-37, 1977-2 C.B. 568, Sec. 3.07, indicates that ownership of 10% of the stock to be owned is not "of small value" and therefore should be considered a substantial part of the stock. Under this authority, the control requirement should be met and the transaction should be permitted to qualify under Sec. 351.

C:2-63 The memorandum should explain that, as long as the additional 25 shares to be received by Greta do not have any other rights attaching to them, they are considered to be stock for purposes of Sec. 351. Thus, Greta will not have to recognize any income when she receives her contingent shares.

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Revenue Ruling 57-586, 1957-2 C.B. 249, addressed negotiable certificates issued to a shareholder in connection with a nontaxable reorganization representing a contingent interest in additional shares of the acquiring corporation's stock that would be issued along with cash dividends if certain occurrences took place. The ruling held that the certificates were "other" property and fell under the boot rules.

Two later court cases and several revenue rulings have changed this position substantially. First, in June M. Carlberg v. U.S., 6 AFTR 2d 5316, 60-2 USTC ¶9647 (8th Cir., 1960), the Eighth Circuit Court of Appeals held that certificates of contingent interest issued to the taxpayer-stockholder in a corporate reorganization permitting her to obtain reserved shares, which were not to be issued pending the determination of liabilities of one of the merging corporations, were stock rather than other property.

In James C. Hamrick, 43 T.C. 21 (1964), the Tax Court held that a taxpayer's contractual right to receive additional stock, contingent upon the earnings of the corporation exceeding a specified amount, is the equivalent of stock within the meaning of Sec. 351. The receipt of additional shares in later years pursuant to the original incorporation agreement was held not to result in the recognition of gain by the transferor.

The IRS held in Rev. Rul. 66-112, 1966-2 C.B. 68, that, because the contingent contractual rights were not specifically marketable and could give rise only to the receipt of additional stock by a transferor, both the stock and the control tests of Sec. 351 were satisfied. The IRS has acquiesced to the Hamrick decision (1966-2 C.B. 2). Revenue Ruling 66-112 also distinguished the facts at hand from those in Rev. Rul. 57-586.

Revenue Ruling 67-90, 1967-1 C.B. 79, provides that a contingent contractual right to receive only additional voting stock provided for in a plan of reorganization satisfies the "solely for voting stock" requirement for a Type B reorganization where the number of additional shares of stock to be issued is determined by a formula based upon the future market price of the shares of the acquiring corporation.

Revenue Procedure 77-37, 1977-2 C.B. 568, places certain restrictions on contingent stock that will be issued as part of a reorganization when a taxpayer is requesting a private letter ruling on the transaction. These restrictions do not apply to a Sec. 351 transaction. Revenue Procedure 83-59, 1983-2 C.B. 575, as modified by Rev. Proc. 2013-32, 2013-28 I.R.B. 55, requires a representation be made about contingent shares that are to be issued as part of a request for a private letter ruling on a Sec. 351 transaction, but it does not place any limit on the portion of the stock that can be considered to be contingent.

C:2-64 The memorandum should point out that, for tax purposes, Lisa and Matthew recognize no gain or loss (Sec. 351(a)). Lisa's basis in her stock is $50,000. Matthew's basis in his stock is $35,000 (Sec. 358(a)). Lima Corporation recognizes no gain on issuing the stock (Sec. 1032). Lima's basis in the land is $35,000 (Sec. 362(a)).

For financial accounting purposes, Lima records the land on its books at its $50,000 FMV and credits the capital account as follows: Common stock, $50,000 (ASC 845, formerly APB No. 29).

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Lima's balance sheet immediately after the corporate information is as follows:

Assets		Capital	
Cash	$ 50,000	Common Stock	$100,000
Land	50,000		
Total	$100,000	Total	$100,000

For financial accounting purposes, the transferor will recognize gains and losses on the asset transfer. In this case, it is unlikely that either Lisa or Matthew would be maintaining GAAP financial accounting records.

C:2-65 Yes. John can avoid recognizing the $175,000 gain according to Ninth Circuit and Second Circuit holdings. In Peracchi v. CIR, 81 AFTR 2d 98-1754, 98-1 USTC ¶50, 150 (9th Cir., 1998), the Ninth Circuit reversed the decision of the Tax Court and held that an unsecured promissory note contributed to a corporation by its sole shareholder had a basis equal to its face amount. A similar result was reached in Lessinger v. CIR, 63 AFTR 2d 89-1055, 89-1 USTC ¶9254 (2nd Cir., 1989).

Therefore, if John contributes a $175,000 promissory note to Newco in addition to the assets, the basis of assets contributed includes the face value of the note and is $475,000 ($250,000 + $175,000). Because the liabilities do not exceed the basis of assets contributed, John recognizes no gain.

C:2-66 The client letter should address two questions. First, if Leticia, Monica, and Nathaniel advance funds to Lemona Corporation, will the advance be recharacterized as equity instead of debt? Second, will the unavailability of alternative financing at "reasonable rates" be significant in any decision to recharacterize?

If the IRS and/or the courts recharacterize the advance as equity, the IRS and/or the courts would treat any "interest" paid to the three investors as "dividends," nondeductible by Lemona. Furthermore, the IRS and/or the courts might treat the advance as nonbusiness related, i.e., as intended to safeguard the investors' initial equity investment. In the latter event, if Lemona later became insolvent, and the three investors were unable to recoup the full amount of the advance, their loss would be treated as nonbusiness bad debt. Because the loss would be capital in character, it would be deductible only to the extent of $3,000 (per year) in excess of any capital gains. No relief for partial losses would be afforded the investors.

The key statutory authority that governs the characterization of an investor advance to a corporation is Sec. 385. Under Sec. 385, the Treasury Secretary is authorized to issue regulations for determining whether an interest in a corporation should be treated as equity or indebtedness. Factors to be considered in the determination include,

- Whether there is a written, unconditional promise to pay a sum certain in money
- Whether the interest is subordinate to any corporate indebtedness
- The corporation's debt to equity ratio
- Convertibility of the interest into corporate stock
- The relationship between stockholdings and the interest in question

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Based on Factors 2, 3, and 5, the three investors' interest in Lemona resembles equity more than debt. The interest is subordinate to other Lemona obligations; the corporation's debt to equity ratio is extraordinarily high (25:1 before the note issuance); and the relationship between the interest in question and the investors' pre-existing stockholdings is proportionate.

On the other hand, based on Factors 1 and 4, the three investors' interest resembles debt more than equity. The interest is evidenced by a note (i.e., a written, unconditional promise to pay a sum certain in money), and it is not convertible into Lemona stock.

Under the authority granted by Sec. 385, the Treasury Secretary issued regulations in 1980 but withdrew them in 1983. In the absence of regulatory authority, court cases provided guidance.

In Rudolph A. Hardman, 60AFTR 2d 87-5651, 82-7 USTC ¶9523 (9th Cir., 1987), the Ninth Circuit Court of Appeals cited 11 factors for distinguishing debt from equity for purposes of Sec. 385:

- The names given to certificates evidencing indebtedness
- The presence or absence of a maturity date
- The source of repayments
- The right to enforce payment of principal and interest
- Participation in management
- The investor's status relative to corporate creditors
- The intent of the parties
- Thin capitalization
- Identity of interest between creditor and stockholder
- Payment of interest out of "dividend" funds
- The ability of the corporation to obtain funds from outside lenders

In the client letter, and to the extent possible, the student should evaluate the three investors' corporate interest in terms of each of these factors.

In Tomlinson v. The 1661 Corporation, 19 AFTR 2d 1413, 67-1 USTC ¶9438 (5th Cir., 1967), a closely held corporation attempted to procure financing from outside lenders, but because of prohibitive interest rates, instead issued 7%, 15-year notes to its existing shareholders in exchange for cash advances of $138,400. The debt was subordinate to other corporate obligations. The corporation was not entitled to pay dividends on its stock until it had paid all past accrued interest on the notes. The corporation issued the notes on a pro rata basis and was thinly capitalized. On its tax return, the corporation deducted "interest" payments on the notes, but the IRS disputed this tax treatment. The IRS argued that based on all the facts and circumstances, the capital advanced by the shareholders was equity, not debt. Therefore, payments on the securities were dividends and nondeductible.

In the client letter, the student should draw an analogy between the facts and issues of the Tomlinson case and those of the case in question. The student also should cite factual dissimilarities that might undermine application of the Tomlinson holding to the present case. From the analysis, he or she should derive a cogent conclusion that addresses the two central issues.

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"What Would You Do In This Situation?" Solution

Ch. C:2, p. C:2-31. The Case of the 100-Year Bonds.

The IRS is likely to carefully scrutinize any issuance of debt to determine whether it should be treated as debt or equity or some combination of each.

The Treasury Department has been given the authority under Sec. 385 to write regulations to distinguish between debt and equity, and also to allow an issue to be treated partly as debt and partly as equity. Thus far, the Treasury Department has not issued final Sec. 385 regulations. As a result, taxpayers must rely on judicial decisions as an indication of how a particular issue will be treated.

Section 385 suggests factors that should be considered in determining whether amount advanced to a corporation should be treated as debt or equity (See page C:2-31). In addition, O.H. Kruse Grain and Milling v. CIR, 5 AFTR 2d 1544, 60-2 USTC ¶9490 (9th Cir., 1960), lists additional factors the courts might consider. The Treasury Department indicated in Notice 94-47, 1994-1 C.B. 357, that it will carefully scrutinize instruments that combine tax treatment for debt with significant equity characteristics. Eight factors were listed that may be considered.

As a CPA, you should inform your client of the risk that the proposed debt issue may be challenged by the IRS and partly or totally reclassified as equity. The fact that many large corporations already have issued debt instruments with extremely long maturities is a point in your client's favor. If the corporation decides to go ahead with the issue, you would be justified in recommending the interest deductions if there exists a realistic possibility of the deductions being sustained upon examination. You also may recommend the deductions if a reasonable basis exists, and the taxpayer makes adequate disclosures. See Statement on Standards for Tax Services No. 1, Tax Return Positions in Appendix E.

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